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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

HERITAGE PACIFIC FINANCIAL, LLC
D/B/A HERITAC PACIFIC FINANCIAL,
a Texas Limited Liability Company,

Plaintiff,

vs.

JAMES HAGUE, et al.,

Defendants.

CASE NO. SACV 09-01466 (RNBx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT CHARLENE Y. CHAO'S
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

[Filed Concurrently With: Notice of
Motion and Motion; Declarations of Jayson
Q. Marasigan and Charlene Y. Chao;
Request for Judicial Notice; Separate
Statement of Undisputed Material Facts
and Conclusions of Law]

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Judge: Andrew J. Guilford
Magistrate Judge: Robert N. Block
Trial Date: December 14, 2010
Complaint Filed: December 11, 2009

AND RELATED CROSS-ACTIONS

TABLE OF CONTENTS

1		
2	1.	INTRODUCTION AND STATEMENT OF PERTINENT FACTS 5
3	2.	THE STANDARD FOR SUMMARY JUDGMENT 5
4	3.	CHAO IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER
5		OF LAW BASED UPON CALIFORNIA'S ANTI-DEFICIENCY
6		STATUTES 6
7	A.	The Statutory Framework of Applicable California Anti-
8		Deficiency Statutes 6
9	i.	Anti-Deficiency Prohibitions..... 6
10	ii.	The "Fraud" Exception to Anti-Deficiency Statutes 7
11	iii.	Limitations on the "Fraud" Exception to Anti-Deficiency
12		Statutes 10
13	B.	The Undisputed Facts Support the Inapplicability of the "Fraud"
14		Exception to the Anti-Deficiency Statutes..... 12
15	4.	CHAO IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON
16		PLAINTIFF'S FIRST CAUSE OF ACTION FOR BREACH OF
17		CONTRACT13
18	5.	CHAO IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON
19		PLAINTIFF'S SECOND CAUSE OF ACTION FOR INTENTIONAL
20		MISREPRESENTATION14
21	6.	CHAO IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON
22		PLAINTIFF'S THIRD CAUSE OF ACTION FOR FRAUDULENT
23		CONCEALMENT16
24	7.	CHAO IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON
25		PLAINTIFF'S FOURTH CAUSE OF ACTION FOR NEGLIGENT
26		MISREPRESENTATION17
27	8.	CONCLUSION18
28		

TABLE OF AUTHORITIES

Cases

<i>Birman v. Loeb</i> , 64 Cal.App.4th 502, 75 Cal.Rptr.2d 294 (1998)	7
<i>Calderone v. United States</i> , 799 F.2d 254 (6th Cir. 1986)	5
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548 (1986)	5
<i>Cornelison v. Kornbluth</i> , 15 Cal.3d 590, 125 Cal.Rptr. 557 (1975)	7
<i>First Fed. Sav. & Loan Assn. v. Lehman</i> , 159 Cal.App.3d 537, 542, 205 Cal.Rptr. 600 (1984)	8
<i>Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.</i> , 66 Cal.App.3d 101, 135 Cal.Rptr. 802 (1977)	7, 8
<i>Guild Mortgage Co. v. Heller</i> , 193 Cal.App.3d 1505(1987)	8, 11
<i>Lawler v. Jacobs</i> , 83 Cal.App.4th 723, 732, 100 Cal.Rptr.2d 52 (2000)	7
<i>Lortz v. Connell</i> , 273 Cal.App.2d 286, 78 Cal.Rptr. 6, 8 (1969)	13
<i>Roseleaf Corp. v. Chierighino</i> , 59 Cal.2d 35 (1963)	6
<i>Southern Calif. Gas Co. v. City of Santa Ana</i> , 336 F.3d 885 (9th Cir. 2003)	6

Statutes

California Civil Code section 1572	14, 15, 16
California Civil Code Section 1642	14
California Code of Civil Procedure section 580a	6
California Code of Civil Procedure section 580b	6, 7, 12, 13, 14, 15, 16, 17, 18
California Code of Civil Procedure section 725a	6
California Code of Civil Procedure section 726	6, 8, 9, 10, 11, 12, 13, 15, 16, 17
California Financial Code section 779	8
California Financial Code section 7459	8
California Financial Code section 7460	8, 9, 10, 11, 12, 13, 15, 16, 17

1 California Financial Code section 15102

8

2
3 Treatises and Secondary Sources

4 *Summary Judgment under the Federal Rules: Defining Genuine Issues of*
5 *Material Fact* (1984) 99 F.R.D. 465, 487-488

4

6 CACI 300

13

7 CACI 303

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION AND STATEMENT OF PERTINENT FACTS

Defendant Charlene Y. Chao ("Chao") is an individual who obtained a purchase money loan from non-party Family Lending Services, Inc. The proceeds of the loan were used to purchase a real property located at 14373 Wolfhound Street, Corona, California 92880 (the "Subject Property") ([Proposed] Statement of Undisputed Material Facts, "UMF" Nos. 1-2). The loan was evidenced by a note in that sum (UMF No. 3), in the sum of \$125,000 (UMF No. 4) and secured by a 2nd deed of trust (UMF No. 5). The 2nd deed of trust was extinguished as a result of the foreclosure of a senior lien. (UMF No. 6) Plaintiff Heritage Pacific Financial, LLC ("Plaintiff") is the alleged holder of the note evidencing the Loan made to Chao. (UMF No. 7) Plaintiff is seeking judgment for the sums unpaid (the "deficiency") on that note. (UMF Nos. 19, 31, 43, and 56)

For purposes of the instant summary judgment motion, the following undisputed facts are dispositive of Plaintiff's claims against Chao: (1) the proceeds of the Loan were used to purchase the Subject Property (UMF No. 2); (2) the Subject Property was a single family residence (UMF No. 9); (3) the Subject Property was occupied by Chao, the purchaser (UMF No. 10); and (4) the Loan was for less than \$150,000 or less, as adjusted annually, commencing on January 1, 1987, to the Consumer Price Index as published by the United States Department of Labor. (UMF No. 11)

Based upon those undisputed facts, Chao is protected by the applicable anti-deficiency statutes and Chao is entitled to judgment as a matter of law.

2. THE STANDARD FOR SUMMARY JUDGMENT

A party may move for summary judgment on the ground that there is no genuine issue of material fact as to its own claims or defenses. *"Where the moving party has the burden—the plaintiff on a claim for relief or the defendant on an affirmative defense—his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party."* *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (emphasis in original), quoting from *Summary Judgment under the Federal Rules*:

1 *Defining Genuine Issues of Material Fact* (1984) 99 F.R.D. 465, 487–488; *Southern Calif.*
2 *Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (citing text). If the
3 evidence offered in support of the motion establishes every essential element of the
4 moving party's claim or defense, there is no need to offer evidence to negate or disprove
5 matters on which the opposing party has the burden of proof at trial. *Celotex Corp. v.*
6 *Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986).

7 As set forth herein, there is no genuine issue of material fact as to Chao's
8 affirmative defense relating to California's anti-deficiency statutes. Because Plaintiff's
9 claims are prohibited by California Code of Civil Procedure section 580b, and no
10 exception to that statute's prohibitions applies, Chao is entitled to judgment as a matter of
11 law.

12 3. **CHAO IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF**
13 **LAW BASED UPON CALIFORNIA'S ANTI-DEFICIENCY STATUTES**

14 A. **The Statutory Framework of Applicable California Anti-Deficiency**
15 **Statutes**

16 i. **Anti-Deficiency Prohibitions**

17 In California, a creditor's right to enforce a debt secured by a mortgage or deed of
18 trust on real property is restricted by statute. Under California law a creditor must rely
19 upon his security before enforcing the debt. Cal. Civ. Proc. §§ 580a, 725a, 726. If after
20 sale the security is insufficient to satisfy the obligation, a creditor may seek entry of
21 judgment on the deficiency. The creditor's right to a judgment against the debtor for such
22 deficiency may be limited or barred by sections 580a, 580b, 580d, or 726 of the Code of
23 Civil Procedure. *Roseleaf Corp. v. Chierighino*, 59 Cal.2d 35, 38-39 (1963).

24 California Code of Civil Procedure section 580b prohibits deficiency judgments
25 after the foreclosure sale of real property that secures a purchase money loan. California
26 Code of Civil Procedure section 580b provides, in pertinent part:

27 "No deficiency judgment shall lie in any event after a sale of
28 real property or an estate for years therein for failure of the

1 purchaser to complete his or her contract of sale, or under a
2 deed of trust or mortgage given to the vendor to secure
3 payment of the balance of the purchase price of that real
4 property or estate for years therein, or *under a deed of trust or*
5 *mortgage on a dwelling for not more than four families given*
6 *to a lender to secure repayment of a loan which was in fact*
7 *used to pay all or part of the purchase price of that dwelling*
8 *occupied, entirely or in part, by the purchaser.”* (Cal. Civ.
9 Proc. § 580b) (Emphasis added)

10 The fact that Plaintiff is the successor in interest to a sold-out junior lienholder is of
11 no consequence. See *Brown v. Jensen*, 41 Cal.2d 193, 259 P.2d 425 (1941). See also
12 *Mortgage Guar. Co. v. Sampsell*, 51 Cal.App.2d 180, 124 P.2d 353 (1942).

13 The purpose of section 580b is to place the risk of inadequate security on the
14 purchase money lender/seller. The lender is thus discouraged from overvaluing the
15 security. Similarly, if inadequacy of the security results from general market decline, the
16 statute prevents aggravation of the downturn that would result if defaulting purchasers
17 were burdened with large personal liability. Section 580b compels the purchase money
18 lender to assume the risk that the security is inadequate. *Cornelison v. Kornbluth*, 15
19 Cal.3d 590, 601-602, 125 Cal.Rptr. 557 (1975); see *Lawler v. Jacobs*, 83 Cal.App.4th 723,
20 732, 100 Cal.Rptr.2d 52 (2000); see also *Birman v. Loeb*, 64 Cal.App.4th 502, 512, 75
21 Cal.Rptr.2d 294 (1998).

22 **ii. The “Fraud” Exception to Anti-Deficiency Statutes**

23 Courts have recognized exceptions to the “anti-deficiency” statutes, including
24 California Code of Civil Procedure section 580b. Among the exceptions to the anti-
25 deficiency prohibitions are actions for “fraud” on the part of the borrower. The “fraud”
26 exception to the anti-deficiency prohibition was discussed in *Glendale Fed. Sav. & Loan*
27 *Assn. v. Marina View Heights Dev. Co.*, 66 Cal.App.3d 101, 135 Cal.Rptr. 802 (1977).
28 Fourth District Court of Appeal in *Glendale Federal* recognized that “[t]he defense of

1 sections 580b and 580d [of the California Code of Civil Procedure] proscribing deficiency
2 judgments is not available to the trustor as a defense to an action by the beneficiary for
3 fraud. [Citations omitted] The statutes only proscribe deficiency judgments; an action for
4 damages for fraud is not one for a deficiency judgment.” *Id.* 135 Cal. Rptr. at 139.

5 The “fraud” exception discussed in *Glendale Federal*, however, was limited by the
6 Fourth District Court of Appeal in the matter of *First Fed. Sav. & Loan Assn. v. Lehman*,
7 159 Cal.App.3d 537, 542, 205 Cal.Rptr. 600 (1984). In *Lehman* the Court of Appeal
8 affirmed a decision by the trial court sustaining a demurrer without leave to amend. In that
9 matter, a lender was bringing suit against borrowers for fraud. The borrowers filed a
10 demurrer, claiming anti-deficiency protection. The lender argued that, pursuant to the
11 holding in *Glendale*, an action for “fraud” did not violate the anti-deficiency statutes. The
12 Court of Appeal in *Lehman*, however, limited the “fraud” exception to the anti-deficiency
13 prohibitions to actions involving waste and impairment of the security. *First Fed. Sav. &*
14 *Loan Assn. v. Lehman*, 159 Cal.App.3d 537, 542, 205 Cal.Rptr. 600 (1984). According to
15 the Fourth District Court of Appeal in *Lehman*: “However, because the Lehman’s alleged
16 misrepresentations were totally unrelated to the value of First Federal’s real property
17 security, the rule allowing actions for fraud damages under the facts of *Glendale Federal*
18 and the cases on which it relies does not apply to this case.” (*Id.* at 542) In so finding, the
19 Court of Appeal affirmed the trial court’s order sustaining the borrowers’ demurrer to the
20 complaint without leave to amend because “First Federal’s fraud cause of action represents
21 an improper attempt to obtain a deficiency judgment through circumvention of applicable
22 anti-deficiency statutes.” (*Id.* at 543)

23 The legislature enacted Financial Code sections 779, 7459, 7460, and 15102 in
24 response to the holding in *Lehman*. *Guild Mortgage Co. v. Heller*, 193 Cal.App.3d
25 1505(1987). In 1987, the California Legislature similarly added subsections (f), (g), and
26 (h) to California Code of Civil Procedure section 726. See Historical and Statutory Notes
27 to Cal. Civ. Proc. § 726. California Financial Code section 7460, subsection (a), provides:

28 “Notwithstanding Section 726 of the Code of Civil Procedure

1 or any other provision of law to the contrary, an association,
2 a federal association, an affiliate of an association or federal
3 association, a service corporation, or any successor in interest
4 thereto, that originates, acquires, or purchases, in whole or in
5 part, any loan secured directly or collaterally, in whole or in
6 part, by a mortgage or deed of trust on real property, or any
7 interest therein, *may bring an action for recovery of damages*,
8 including exemplary damages not to exceed 50 percent of the
9 actual damages, against a borrower where the action is based
10 on fraud under Section 1572 of the Civil Code and the
11 fraudulent conduct by the borrower induced the original
12 lender to make that loan.” (Emphasis added)

13 California Financial Code section 7460, subsection (c), provides:

14 “Any action maintained under this section for damages shall
15 not constitute a money judgment for deficiency or a
16 deficiency judgment within the meaning of Section 580a,
17 580b, or 580d of the Code of Civil Procedure.”

18 California Code of Civil Procedure section 726, subsection (f), similarly provides:

19 “Notwithstanding this section or any other provision of law to
20 the contrary, any person authorized by this state to make or
21 arrange loans secured by real property or any successor in
22 interest thereto, that originates, acquires, or purchases, in
23 whole or in part, any loan secured directly or collaterally, in
24 whole or in part, by a mortgage or deed of trust on real
25 property, in whole or in part, *may bring an action for*
26 *recovery of damages*, including exemplary damages not to
27 exceed 50% of the actual damages, against a borrower where
28 the action is based on fraud under Section 1572 of the Civil

1 Code and fraudulent conduct by the borrower induced the
2 original lender to make that loan.” (Emphasis added)

3 California Code of Civil Procedure section 726, subsection (h), provides:

4 “Any action maintained pursuant to subdivision (f) for
5 damages shall not constitute a money judgment for
6 deficiency, or a deficiency judgment within the meaning of
7 Section 580a, 580b, or 580d of the Code of Civil Procedure.”

8 Presumably, since Plaintiff’s “fraud” cause of action is not one based upon waste or
9 impairment of security and thus based on the holding in *Lehman*, Plaintiff is relying upon
10 either of the aforementioned exceptions to the anti-deficiency statutes.

11 **iii. Limitations on the “Fraud” Exception to Anti-Deficiency Statutes**

12 The “fraud” exception to the anti-deficiency statutes, as codified in California Code
13 of Civil Procedure section 726, subsection (f), and Financial Code section 7460, subsection
14 (a), does not apply to the Loan made to Chao.

15 California Code of Civil Procedure section 726, subsection (g), provides:

16 “Subdivision (f) does not apply to loans secured by single
17 family, owner-occupied residential real property, when the
18 property is actually occupied by the borrower as represented
19 to the lender in order to obtain the loan and the loan is for an
20 amount of one hundred fifty thousand dollars (\$150,000) or
21 less, as adjusted annually, commencing on January 1, 1987, to
22 the Consumer Price Index as published by the United States
23 Department of Labor.”

24 California Financial Code section 7460, subsection (b), provides:

25 “The provisions of this section shall not apply to loans
26 secured by single-family, owner-occupied residential real
27 property, when the property is actually occupied by the
28 borrower as represented to the lender in order to obtain the

1 loan and the loan is for an amount of one hundred fifty
2 thousand dollars (\$150,000) or less, as adjusted annually,
3 commencing on January 1, 1987, to the Consumer Price
4 Index as published by the United States Department of
5 Labor.”

6 Based upon subsection (g) of California Code of Civil Procedure section 726 and
7 subsection (b) of California Financial Code section 7460, the “fraud” exception to the anti-
8 deficiency prohibitions do not apply to situations here the loan at issue was: (1) secured by
9 a single-family residential property; (2) that is actually owner occupied; and (3) is for
10 \$150,000 or less, adjusted annually, commencing January 1, 1987, to the Consumer Price
11 Index.

12 The foregoing statutory framework was recognized by the California Court of
13 Appeal in *Guild Mortgage Co. v. Heller*, 193 Cal.App.3d 1505(1987):

14 “In 1985, the Legislature, intending to curtail fraud in the real
15 estate market and to vitiate the holding in *Lehman* enacted
16 Financial Code sections 779, 7459, 7460, and 15102. Under
17 these statutes, banks, savings and loan associations, and credit
18 unions may now maintain an action for damages, including
19 punitive damages not exceeding 50 percent of actual
20 damages, against a borrower based on fraud when the conduct
21 induced the lender to make a real estate loan. To avoid any
22 ambiguity, such actions are expressly excepted from the
23 antideficiency provisions of Code of Civil Procedure section
24 726, 580a, 580b, and 580d. Because of evidence that fraud
25 was most prevalent in loans for large, single-family
26 dwellings, multiple unit dwellings and commercial property,
27 the legislation exempted loans secured by single-family
28 residential real property, when the property is *actually*

1 *occupied by the borrower* and the loan is for \$150,000 or
2 less.” *Id.* at 1512-1513, footnotes omitted, emphasis in
3 original.

4 **B. The Undisputed Facts Support the Inapplicability of the “Fraud”**
5 **Exception to the Anti-Deficiency Statutes**

6 It is undisputed that the proceeds of the Loan were used to purchase the Subject
7 Property. (UMF No. 2) It is undisputed that the deed of trust securing the Loan was
8 extinguished by the foreclosure of a senior lien. (UMF No. 6) It is undisputed that
9 Plaintiff’s suit is brought to recover damages because the foreclosure sale did not satisfy
10 the outstanding balance on the Loan. (UMF Nos. 19, 31, 43, and 56) Based upon those
11 undisputed material facts, the anti-deficiency prohibitions codified in California Code of
12 Civil Procedure section 580b operate so as to prohibit any deficiency judgment, unless an
13 exception applies.

14 Plaintiff argues that the “fraud” exception to the anti-deficiency prohibition is
15 applicable here. Plaintiff alleges that Chao misrepresented her income to the lender,
16 Plaintiff’s predecessor in interest, inducing the lender to make the real estate loan.
17 Assuming those facts to be true, under California Code of Civil Procedure section 726,
18 subsection (f), and California Financial Code section 7460, subsection (a), Plaintiff would
19 be authorized to obtain a deficiency judgment based upon “fraud” provided that the section
20 726, subsection (g), and section 7460, subsection (a), are inapplicable. The undisputed
21 facts show that they are applicable.

22 It is undisputed that the Loan was secured by a single-family residential property.
23 (UMF No. 9) It is undisputed that the Subject Property was actually occupied by Chao.
24 (UMF No. 10) It is also undisputed that the Loan was for \$125,000, which is less than
25 \$150,000, adjusted annually. (UMF Nos. 4 and 11) According to the United States
26 Department of Labor, Bureau of Labor Statistics, \$150,000 in 1987 is the equivalent of
27 \$266,197.18 on January 1, 2006. (UMF No. 10)

28 Based upon the undisputed material facts, Chao is entitled to judgment as a matter

1 of law. California Code of Civil Procedure section 580b prohibits deficiency judgments
2 after the foreclosure of real property that secures a purchase money loan. Although
3 California Code of Civil Procedure section 726, subsection (f), and California Financial
4 Code section 7460, subsection (a), codify a "fraud" exception to the anti-deficiency
5 prohibition in Civil Procedure section 580b, that "fraud" exception does not apply to the
6 Loan at hand. Those Civil Procedure and Financial Code section are made expressly
7 inapplicable by subsection (g) of Civil Procedure section 726 and subsection (b) of
8 Financial Code section 7460 where the loan is secured by a single-family residential real
9 property that is actually occupied by the borrower, and the loan is for \$150,000 or less in
10 1987 dollars. The undisputed material facts evidence that the anti-deficiency statutes
11 apply that the "fraud" exception does not apply.

12 4. **CHAO IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON**
13 **PLAINTIFF'S FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT**

14 The elements of a breach of contract action are: (1) the existence of the contract; (2)
15 plaintiff's performance of the contract or excuse for non-performance; (3) defendant's
16 breach of the contract; and (4) the resulting damage to the plaintiff. *Lortz v. Connell*, 273
17 Cal.App.2d 286, 290, 78 Cal.Rptr. 6, 8 (1969); see also CACI 300, 303.

18 Even assuming that the first three elements for breach of contract are met,
19 Plaintiff's first cause of action for breach of contract violates California Code of Civil
20 Procedure section 580b. It is undisputed that the proceeds of the Loan were used to
21 purchase the Subject Property. (UMF No. 13) It is undisputed that the deed of trust
22 securing the Loan was extinguished by the foreclosure of a senior lien. (UMF No. 17)

23 Plaintiff's prayer for relief, applicable to all causes of action, seeks *damages* from
24 each defendant, including Chao. (UMF No. 23) As set forth above, because the Loan
25 proceeds were "purchase money" (used to purchase the Subject Property), a deficiency
26 judgment is prohibited after foreclosure. There is no breach of contract exception to
27 California Code of Civil Procedure section 580b. Plaintiff's attempt to recover damages
28 based upon the deficiency is prohibited. Plaintiff's first cause of action for breach of

1 contract should be summarily adjudicated.

2 Plaintiff may attempt to argue that the breach of contract claim is not an action for
3 “damages” but rather for specific performance of promises by the borrower, to verify her
4 income by executing a form 4506-T and providing proof of residence, contained in the
5 form 1003 Uniform Residential Loan Application (the “1003”). Even assuming that the
6 1003, by operation of California Civil Code section 1642, is incorporated into the note
7 evidencing the Loan (UMF No. 14), Plaintiff’s argument would be little more than a “red-
8 herring”. The only purpose in specifically performing those covenants by the borrower
9 would be for the purpose of discovery of facts supporting its misrepresentation causes of
10 action. Should Plaintiff attempt to mischaracterize its breach of contract cause of action in
11 this manner, it would be a blatant attempt to perform an end-run around the anti-deficiency
12 prohibitions and get Plaintiff nowhere.

13 **5. CHAO IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON**
14 **PLAINTIFF’S SECOND CAUSE OF ACTION FOR INTENTIONAL**
15 **MISREPRESENTATION**

16 Plaintiff’s action for damages based upon intentional misrepresentation is barred by
17 California Code of Civil Procedure section 580b. It is undisputed that the proceeds of the
18 Loan were used to purchase the Subject Property. (UMF No. 25) It is undisputed that the
19 deed of trust securing the Loan was extinguished by the foreclosure of a senior lien. (UMF
20 No. 29)

21 Plaintiff’s cause of action for intentional misrepresentation is, in essence, a fraud
22 claim as defined by California Civil Code section 1572, which provides:

23 “Actual fraud, within the meaning of this chapter, consists of
24 any of the following acts, committed by a party to the
25 contract, or with his connivance, with intent to deceive
26 another party thereof, or to induce him to enter into the
27 contract:

28 1. The suggestion, as a fact, of that which is not true,

- 1 by one who does not believe it to be true;
- 2 2. The positive assertion, in a manner not warranted
- 3 by the information of the person making it, of that
- 4 which is not true, though he believes it to be true;
- 5 3. The suppression of that which is true, by one
- 6 having knowledge or belief of the fact;
- 7 4. A promise made without any intention of
- 8 performing it; or
- 9 5. Any other act fitted to deceive.”

10 Plaintiff's second cause of action is a fraud claim – based upon borrowers'
11 suggestion, as a fact, of that which is not true, by one who does not believe it to be true.
12 (UMF No. 32) California Code of Civil Procedure section 726, subsection (f), and
13 Financial Code section 7460, subsection (a), do authorize actions for damages based upon
14 this type of fraud, notwithstanding the anti-deficiency prohibition in Code of Civil
15 Procedure section 580b. Those authorizing provisions, however, are inapplicable where
16 the elements of Code of Civil Procedure section 726, subsection (g), and Financial Code
17 section 7460, subsection (b) are met. As recited above, the “fraud” exception to the anti-
18 deficiency prohibitions do not apply to situations here the loan at issue was: (1) secured by
19 a single-family residential property; (2) that is actually owner occupied; and (3) is for
20 \$150,000 or less, adjusted annually, commencing January 1, 1987, to the Consumer Price
21 Index.

22 Here, the undisputed facts are that the Loan was secured by a single-family
23 residential property. (UMF No. 33) It is undisputed that the Subject Property was actually
24 occupied by Chao. (UMF No. 34) It is also undisputed that the Loan was for \$125,000,
25 which is less than \$150,000, adjusted annually. (UMF Nos. 27 and 35) According to the
26 United States Department of Labor, Bureau of Labor Statistics, \$150,000 in 1987 is the
27 equivalent of \$267,197.18 on January 1, 2007. (UMF No. 35)

28 The “fraud” exception to California Code of Civil Procedure section 580b, as

1 codified in Code of Civil Procedure section 726, subsection (f), and Financial Code section
2 7460, subsection (a), therefore does not apply and partial summary judgment should be
3 granted on Plaintiff's second cause of action for intentional misrepresentation.

4 6. **CHAO IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON**
5 **PLAINTIFF'S THIRD CAUSE OF ACTION FOR FRAUDULENT**
6 **CONCEALMENT**

7 Plaintiff's third cause of action for fraudulent concealment is similarly barred by
8 California Code of Civil Procedure section 580b. It is undisputed that the proceeds of the
9 Loan were used to purchase the Subject Property. (UMF No. 37) It is undisputed that the
10 deed of trust securing the Loan was extinguished by the foreclosure of a senior lien. (UMF
11 No. 41)

12 Plaintiff's cause of action is one for "fraud" as defined by the third act described in
13 California Civil Code section 1572 – the suppression of that which is true, by one having
14 knowledge or belief of the fact. (UMF Nos. 43-44) Again, despite the anti-deficiency
15 prohibitions, such "fraud" actions are authorized by California Code of Civil Procedure
16 section 726, subsection (f), and Financial Code section 7460, subsection (a). However,
17 those provisions do not apply to situations here the loan at issue was: (1) secured by a
18 single-family residential property; (2) that is actually owner occupied; and (3) is for
19 \$150,000 or less, adjusted annually, commencing January 1, 1987, to the Consumer Price
20 Index. Cal. Civ. Proc. §726(g), Cal. Fin. C. § 7460(b).

21 Here, the undisputed facts are that the Loan was secured by a single-family
22 residential property. (UMF No. 45) It is undisputed that the Subject Property was actually
23 occupied by Chao. (UMF No. 46) It is also undisputed that the Loan was for \$125,000,
24 which is less than \$150,000, adjusted annually. (UMF Nos. 39 and 47) According to the
25 United States Department of Labor, Bureau of Labor Statistics, \$150,000 in 1987 is the
26 equivalent of \$273,799.05 on January 1, 2007. (UMF No. 47)

27 The "fraud" exception to California Code of Civil Procedure section 580b, as
28 codified in Code of Civil Procedure section 726, subsection (f), and Financial Code section

1 7460, subsection (a), therefore does not apply and partial summary judgment should be
2 granted on Plaintiff's third cause of action for fraudulent concealment.

3 7. **CHAO IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON**
4 **PLAINTIFF'S FOURTH CAUSE OF ACTION FOR NEGLIGENT**
5 **MISREPRESENTATION**

6 Plaintiff's fourth cause of action for fraudulent concealment is also barred by
7 California Code of Civil Procedure section 580b. It is undisputed that the proceeds of the
8 Loan were used to purchase the Subject Property. (UMF No. 49) It is undisputed that the
9 deed of trust securing the Loan was extinguished by the foreclosure of a senior lien. (UMF
10 No. 53) There is no exception to the California Code of Civil Procedure section 580b for
11 "negligent misrepresentation". Plaintiff may attempt to argue, however, that the negligent
12 misrepresentation claim is one for "fraud" as defined by the second act in California Civil
13 Code section 1572 - the positive assertion, in a manner not warranted by the information of
14 the person making it, of that which is not true, though he believes it to be true. Even if
15 Plaintiff's argument were accepted, and such action were authorized by California Code of
16 Civil Procedure section 726, subsection (f), and Financial Code section 7460, subsection
17 (a), the undisputed facts of this case make those provisions inapplicable.

18 Here, the undisputed facts are that the Loan was secured by a single-family
19 residential property. (UMF No. 57) It is undisputed that the Subject Property was actually
20 occupied by Chao. (UMF No. 58) It is also undisputed that the Loan was for \$125,000,
21 which is less than \$150,000, adjusted annually. (UMF Nos. 51 and 59) According to the
22 United States Department of Labor, Bureau of Labor Statistics, \$150,000 in 1987 is the
23 equivalent of \$273,799.05 on January 1, 2007. (UMF No. 59)

24 The "fraud" exception to California Code of Civil Procedure section 580b, as
25 codified in Code of Civil Procedure section 726, subsection (f), and Financial Code section
26 7460, subsection (a), therefore does not apply and partial summary judgment should be
27 granted on Plaintiff's fourth cause of action for intentional misrepresentation.

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1 **8. CONCLUSION**

2 Based on the foregoing, there is no genuine issue of material fact as to Chao's
3 affirmative defense relating to California's anti-deficiency statutes. Because Plaintiff's
4 claims are prohibited by California Code of Civil Procedure section 580b, and no
5 exception to that statute's prohibitions applies, Chao is entitled to summary judgment as a
6 matter of law. Alternatively, Chao is entitled to partial summary judgment of the several
7 issues raised by Plaintiff's complaint.

8
9 DATED: June 9, 2010

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